

CONGRESS MAKES SIGNIFICANT CHANGES TO PAYCHECK PROTECTION PROGRAM

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Since the Small Business Administration (SBA) and United States Treasury (Treasury) issued the first Interim Final Regulations on April 2, 2020 under the Paycheck Protection Program (PPP), borrowers, potential borrowers and even members of Congress have raised questions over whether the PPP, as implemented, would provide the relief borrowers need and Congress intended when it enacted the Coronavirus Aid, Relief and Economic Security Act (CARES Act). Questions arose such as whether the PPP requirement that 75 percent of the forgivable amount¹ be used for payroll costs provided sufficient flexibility for businesses with higher fixed costs and whether the two-year note term mandated by the SBA and Treasury allowed a sufficient time for repayment of non-forgiven amounts.

In answer to these concerns, on June 3, 2020, the Senate passed by unanimous consent the [Paycheck Protection Program Flexibility Act, HR 7010](#) (the Flexibility Act), which the House of Representatives had previously passed on May 28, 2020. The President signed the Flexibility Act into law on June 5, 2020.

The Flexibility Act overrides a number of program provisions imposed by the SBA and makes a few changes to the PPP as originally authorized by the CARES Act. The changes include:

- Modification of the SBA/Treasury imposed requirement that 75 percent of the forgivable amount be used for payroll costs. The Flexibility Act provides that a borrower must use 60 percent of a "covered loan" for payroll costs in order to be eligible for forgiveness. We would expect that the SBA and Treasury would construe this to mean 60 percent of the forgivable amount of the loan to align with the previously issued forgiveness application, but this requires clarification from the SBA and Treasury. This amendment will require updates to the [Interim Final Rule on Loan Forgiveness](#) that was issued on May 22, 2020 and to the previously issued PPP loan forgiveness application.
- The minimum loan term for new PPP loans made after the effective date of the Flexibility Act is five years. The Flexibility Act also allows lenders and borrowers under existing PPP loans to negotiate a longer repayment term for non-forgiven amounts. Notably, the Flexibility Act did not change the interest rate payable on PPP loans from the 1 percent imposed by the SBA and Treasury. Unless the SBA and Treasury allow for adjustment of the interest rate up to the maximum allowed under the CARES Act (4 percent), some lenders may be less interested in making new PPP loans or negotiating longer payback periods on existing loans.
- The "covered period" for PPP loans, which is the period during which borrowers are required to re-hire employees or reinstate pay cuts to employees to avoid forgiveness penalties is extended from June 30, 2020 to December 31, 2020. In addition, the Flexibility Act eliminates penalties for failure to rehire former employees or hire replacement employees under certain circumstances. Please note, however, that while a reading of the "covered period" in the CARES Act also initially appeared to be

the time in which new PPP loans could be made, the Senate only passed the Flexibility Act by consent after Majority Leader McConnell agreed to submit a letter to the *Congressional Record* stating that the extension of the covered period is not meant to extend the deadline for new loans beyond June 30, 2020.

- The "covered period" for expenditure of loan proceeds for eligible costs is extended from 8 weeks to 24 weeks. Borrowers with PPP loans made before the enactment of the Flexibility Act may elect either an 8-week or 24-week covered period.
- Deferrals of payments under a PPP loan are deferred until a forgiveness determination is made on the loan and funds are remitted to the lender by the SBA. A borrower must request forgiveness no later than the date that is 10 months after the end of its 8-week or 24-week "covered period" for expenditure of loan proceeds.
- Section 2302 of the CARES Act provides that employers may defer the payment of the employer's portion of Social Security taxes and certain railroad retirement taxes. The deferral applies to deposits and payments of the employer's share of Social Security tax (6.2 percent) that would otherwise be required to be made during the period beginning on March 27, 2020 and ending December 31, 2020. However, under the CARES Act, an employer could not use the deferral once its loan was forgiven. The Flexibility Act, however, provides that employers that have received forgiveness of a PPP loan may continue to defer the employer tax until December 31, 2020. This provision of the Flexibility Act is retroactive and applies to all PPP loans made under the CARES Act.

The amendments included in the Flexibility Act are significant and will require further changes to the previously issued Interim Final Rule on Loan Forgiveness and the previously issued loan forgiveness application. Our team of attorneys and advisors continue to monitor these changes and will provide further updates about these matters. For additional guidance, please contact [Josh Mullen](#), [Scott Sargent](#), [Jeff Wagner](#), and [David Webb](#), or your Baker Donelson attorney. For more information and general guidance on how to address other legal issues related to COVID-19, please visit the [Coronavirus \(COVID-19\): What You Need to Know information page](#) on our website.

¹ Note: The Interim Final Regulations issued by the SBA on April 2, 2020 make reference to a requirement that "75 percent of the loan proceeds" be used for payroll costs while also providing that no more than 25 percent of the forgivable amount may be used for non-payroll costs. SBA clarified the requirement that at least 75 percent of the *forgivable amount* must be used for payroll costs in connection with issuance of the Forgiveness Application on May 15, 2020.